**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



In the Matter of

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| Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information. | ) ) ) ) | **CC Docket No. 96-115** |

# NYNEX REPLY COMMENTS

NYNEX Telephone Companies

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Dated: June 26, 1996

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## SUMMARY

The NYNEX Reply Comments show that the regulations the Commission should adopt to implement Section 222 should reflect two key points: the regulations must apply equally to all carriers and they must provide carriers with the necessary degree of flexibility in complying with the mandates of Section 222 that Congress intended.

Unfortunately, a number of parties have sought to use this rulemaking as a means to tinker with the balance of competitive and privacy interests adopted by Congress in fashioning Section 222. These parties seek to have the Commission adopt differing requirements for different carriers. The NYNEX Reply Comments show that Section 222 does not permit such differentiation.

The NYNEX Reply Comments show that the claims of certain parties that written affirmative customer authorization is required to use CPNI for a purpose other than those specified in Section 222(c)(1) are baseless. Congress intended carriers to have flexibility in obtaining authorization.

Finally, it is shown in these Reply Comments that the Commission should not adopt detailed regulations regarding aggregate CPNI or subscriber list information.

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# NYNEX REPLY COMMENTS

## I. INTRODUCTION

The NYNEX Telephone Companies[1] ("NYNEX") hereby provide reply comments in the above docket.

The parties' comments reflect a broad consensus that the Commission should adopt regulations to implement Section 222 of the Communications Act that reflect the deregulatory and pro-consumer policies underlying the Telecommunications Act of 1996 ("the 1996 Act"). While there was broad agreement about the goals that the Commission should pursue in implementing Section 222, there was, as would be expected, disagreement among the parties as to how these goals can best be achieved.

[1] The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

As shown in the initial NYNEX Comments, Congress has in Section 222 itself, the legislative history of that section, and the text and the legislative history of the 1996 Act as a whole, provided clear guidance in this area. Congress has made it clear that the responsibilities under Section 222 apply equally to all carriers and that, in the instance of the CPNI of individual customers, privacy concerns are paramount. It is equally clear that Congress provided carriers with flexibility in meeting their requirements under Section 222.

The 1996 Act provides a "pro-competitive, deregulatory national policy framework."[2] As is clear from a review of the comments, some parties are unhappy with the balance selected by Congress in establishing that framework. These parties believe that Congress has failed to adequately address competitive advantages that either local exchange companies ("LECs"), as a whole, or Bell Operating Companies ("BOCs"), in particular, possess. They seek to use the Commission's regulations regarding CPNI as a tool to right the perceived competitive wrongs that Congress allegedly failed to address in the 1996 Act. While Section 222 imposes the same requirements on all carriers, these parties ask the Commission to differentiate among carriers on the basis of status (i.e., incumbent LECs or BOCs) or market power. It is claimed, for example, that there is a "disparity" among competitors that the 1996 Act has left undisturbed that the Commission should address in formulating its CPNI rules.[3] As shown in the comments

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[2] Conference Report at 1.

[3] LDDS at 4.

of NYNEX and others, the sort of differentiation among carriers that is urged by these parties was expressly considered and rejected by Congress.[4]

The 1996 Act represents the decision of Congress as to how competitive issues are to be addressed and resolved. Competitive issues were directly addressed by Congress in Section 222 itself. To use the terms of the Joint Explanatory Statement Report, Section 222 "strives to balance both competitive and consumer privacy interests."[5] Thus, the appropriate balance has been struck by Congress and no further adjustments by the Commission are permitted. The mandate of Congress is clear: all carriers have the same responsibilities under Section 222. This should not be surprising since customers do not have greater or lesser expectations of privacy depending on the identity of their carrier.[6]

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[4] NYNEX at 2; Pennsylvania Office of Consumer Affairs at 4-5; SBC at 2; California P.U.C. at 2.

[5] Joint Explanatory Statement at 205.

[6] MFS suggests that the Commission should forbear from applying Section 222 to carriers with less than 5% of the presubscribed lines. (MFS at 10). Somewhat similar arguments regarding forbearance are made by other parties. (See, Small Business in Telecommunications at 5-6). Section 10 of the Communications Act permits the Commission under certain circumstances to forbear from applying generally applicable provisions. NYNEX questions whether Section 10 forbearance can be exercised to exempt certain classes of carriers from the reach of Section 222. In making a determination under Section 10, the Commission is required to determine that enforcement of a provision "is not necessary for the protection of consumers." Given the paramount importance to Congress of consumers' privacy interests in fashioning Section 222, it is difficult to imagine a situation in which forbearance with regard to Section 222 would be permitted for particular classes of carriers. It is clear, in any event, that no party has come close to making the requisite showing under Section 10.

## II. DEFINITION OF TELECOMMUNICATIONS SERVICE

As shown in the NYNEX Comments, the Commission's decision to use "traditional service distinctions" as the basis for implementing Section 222(c)(1)(A) was a reasonable one.[7] Other parties have also endorsed the Commission's approach.[8]

Some parties have expressed concern that the three-bucket approach may frustrate the achievement of the goals of the 1996 Act: the timely delivery of an expanding array of telecommunications services to the public. These parties urge that the Commission adopt a one- or two-bucket approach.[9] These concerns are shared by NYNEX. Traditional service distinctions will rapidly disappear as the regulatory constraints which supported these restrictions are removed. The concerns of these parties can largely be addressed by the Commission's adopting a broader interpretation of the term "telecommunications service," as suggested by US West and others, or, at a minimum, by acknowledging a need to re-examine the initial delineation at some fixed

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[7] NYNEX at 7. As shown in those Comments, however, the use of traditional service distinctions should place short-haul toll in the local "bucket," exclusively, and not in both the local and interexchanges buckets. One party has urged that the Commission's approach be modified so that toll service be included only in the interexchange category. (Telecommunications Resellers Assn. at 15.) This suggestion is inconsistent with traditional service distinctions. In addition, this suggestion is contrary to the legislative history of Section 222. (See, NYNEX March 5, 1996, Petition for Declaratory Ruling at 6-9). Adoption of this suggestion would further hamstring LECs in competing with IXCs for long distance service. (NYNEX Comments at 9-10).

[8] Ameritech at 2-3; Frontier at 4; Sprint at 2.

[9] US West at 4-6; Bell South at 7-9; AT&T at 5-6; MCI at 3-6.

point in the future.[10] In addition, such concerns can be addressed by adopting regulations dealing with notification and authorization which do not restrict carrier flexibility in a manner not contemplated by Congress.

## III. "SERVICES NECESSARY TO OR USED IN THE PROVISION OF A TELECOMMUNICATIONS SERVICE"

As shown in the NYNEX Comments and others, in interpreting the scope of Section 222(c)(1)(B), which deals with "services necessary to or used in the provision of a telecommunications service," the Commission should adopt a common-sense, consumer oriented approach.[11] This type of approach is called for by both Section 222(c)(1)(B) -- the word "used" and the selection of "the publishing of directories" as the one example that falls under this provision support such an approach -- and the overall legislative purposes in adopting the 1996 Act. Under this approach, CPE, inside wire, and certain types of information services would be included within Section 222(c)(1)(B).[12]

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[10] NYNEX at 10; Pac Tel at 3.

[11] NYNEX at 11-12; Ameritech at 5; US West at 4-6.

[12] A number of parties, in arguing that carriers should not be able to use CPNI to market information services without customer authorization, note that information and enhanced services are not telecommunications services. (Alarm Industry Communications Committee at 8; Information Technology Assn. at 3; Compuserve at 5). However, the fact that a service is not a telecommunications service does not address the relevant issue under Section 222(c)(1)(B): many information services are "used or necessary" in the provision of a telecommunications service in the same way that directories are. For example, Arch Communications notes that "voice storage and retrieval services" fall within Section 222(c)(1)(B). (Arch at 7-8).

## IV. CUSTOMER NOTIFICATION AND AUTHORIZATION

A number of parties urge the Commission to read Section 222(c)(1) as requiring a customer's affirmative written authorization prior to the use of CPNI for any purpose other than those specified in Section 222(c)(1).[13]

As shown in the comments of NYNEX and other parties, there is absolutely no basis to infer any congressional intent to require that the customer approval called for by Section 222(c)(1) be in the form of a written affirmative response.[14] Quite the contrary, Congress, by expressly referring to written authorization only in the case of disclosing CPNI to a third party, clearly intended to permit less restrictive means of obtaining approval when the customer's own carrier intends to use the CPNI.

The decision by Congress to specify written authorization only in the case of disclosure to a third party must be considered against a background of Congressional awareness of prior Commission activity in this area. The Commission has recognized that requiring prior written authorization from small business and residential customers is likely to deprive these customers of the benefits of one-stop shopping that the 1996 Act was clearly intended to permit. The Commission also has recognized that customers typically do not have privacy concerns where a prior customer/supplier relationship

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[13] Some parties have suggested that certain carriers (e.g., ILECs) be required to obtain prior written authorization, while other carriers would be permitted more freedom in obtaining authorization. As noted earlier, Section 222 does not contemplate different requirements for particular carriers.

[14] NYNEX at 14; AT&T at 12; Ameritech at 9; Bell Atlantic at 7.

exists.[15] When considered against this background, it is clear that to require written authorization would go beyond the specific intentions of Congress. The 1996 Act was intended to develop a fully competitive telecommunications system, a system that would be subject to a much lesser degree of regulation. As shown in the NYNEX Comments and those of others, a system under which customers are provided adequate notice by a carrier of their CPNI rights and are provided an opportunity to limit the internal use by a carrier of their CPNI fully comports with Section 222.[16]

The 1996 Act contemplates customers moving freely among carriers, selecting the best overall package of services that meets their needs. The 1996 Act reflects a belief that consumers will make these choices intelligently. Creating a regulatory system that would establish, with a high degree of specificity, the details of customer notification and written authorization, with the Commission being required to actively monitor compliance with these details, and with carriers being required to re-solicit customers' written authorization on a regular basis, is, NYNEX believes, clearly not what Congress had in mind. Adopting this sort of system, in addition to being difficult to square with the fact that Congress referred to written authorization only in the case of disclosure to third parties, is contrary to the overall deregulatory thrust of the 1996 Act. The 1996 Act reflects an expectation that customers should be able to treat their choices of telecommunications carriers in the same way that they treat other

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[15] NYNEX at 16; Bell Atlantic at 8; US West at 15; AT&T at 12.

[16] NYNEX at 15-16; US West at 16-17; SBC at 10; AT&T at 12.

decisions about purchases of goods and services. The comments of parties arguing for written customer authorization reflects a paternalistic approach to customers that is not supported by the 1996 Act.

## V. AGGREGATE CPNI

Two issues related to the aggregate CPNI require further comment.[17] First, it has been suggested that the Commission take various steps to regulate the provision of aggregate CPNI, including requiring publication of notices of its availability and the suggestion that the FCC maintain files describing this data.[18] As discussed in the the comments of NYNEX and others, detailed regulation is neither required nor appropriate.[19]

Second, the American Public Communications Council ("APCC") has argued that information related to the use of individual LEC payphones is aggregate CPNI data that must be provided upon request to others, including providers of independent payphones. NYNEX disagrees. The APCC argument is founded upon a claim that there is no "customer" subscribing to the payphone line (APCC at 5) and a contention that Section 222, in the absence of a true customer, requires the LEC to

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[17] Of note, no party established a record to support the need for a LEC to disclose aggregate CPNI prior to its using such data in a manner that would require disclosure. A number of parties did address the burdens on a LEC if prior disclosure were to be required. (See, e.g., NYNEX at 23).

[18] Information Technology Assn. at 8; Texas PUC at 10.

[19] NYNEX at 23; ALLTEL at 6; Pac Tel at 13.

disclose the usage information associated with the LEC payphones as though it were aggregate CPNI. If anything, APCC's argument proves that payphone-related information is not CPNI, aggregate or otherwise. Section 222(f)(2) defines aggregate CPNI as information from which individually identifiable customer information has been removed. If, as APCC concedes, there is no such individually identifiable customer information in the context of payphone service, by definition, there can be no CPNI in that context either.[20]

There is also no merit to APCC's claim that disclosure of payphone information is compelled by "competitive equity." Virtually all private payphone operators ("PPOs") use "smart sets" which record the same type of information APCC claims is needed from the LECs. Thus, PPOs have the same type of information the LECs have and will not suffer any competitive disadvantage if they do not have the LECs' information.

## VI. CARRIERS' RESPONSIBILITY REGARDING DATA SUPPLIED BY OR OBTAINED FROM OTHER CARRIERS

Some parties have raised concerns regarding the handling by incumbent LECs ("ILECs") of customer data in situations in which the ILEC is dealing with resellers, Competitive Local Exchange Carriers ("CLECs") and IXCs.[21] These concerns

[20] Even if there is a "customer" in the context of LEC payphone provisioning, the only customer could be the LEC payphone provider. This is particularly so given that, under Section 276 of the Act, the LEC payphone provider will be required to pay (or have imputed to it) the costs of the access line and usage

[21] See, e.g., AT&T at 17; Air Touch Communications at 13.

focus on the issue of disclosure by the ILEC to the "competitive carrier" of the CPNI of an individual end-user customer, after that customer elects to take service from the competitive carrier. This issue deals with the interpretation of Section 222(c)(2) dealing with disclosure of individual CPNI by a carrier upon a customer's written request. Some commentors have suggested that incumbent carriers not be allowed to require a competing carrier to produce a customer's specific written request as a pre-condition to disclosure of the customer's CPNI to the carrier.[22] That is, these commentors posit a situation in which the competing carrier obtains the requisite authorization from the customer and the carrier possessing the CPNI can accept the competing carrier's representation that it has obtained the required authorization.

NYNEX believes that, as suggested by these comments, a carrier should be permitted to rely on a competing carrier's statements that it possesses the requisite customer authorization. The 1996 Act clearly requires that a carrier disclose CPNI to a third party upon receipt of a written authorization from a customer. It is not clear to NYNEX that it imposes a requirement on the carrier possessing the CPNI to obtain individual authorization for its inspection in each instance. Here, as in other cases, we believe that in the absence of a clear legislative directive, the Commission should be governed by the overall policy goals of the 1996 Act. In the future posited by the 1996 Act, there will be multiple providers of services, competing with each other across

[22] See, e.g., AT&T at 17

previously established regulatory boundaries. Customers will be expected to move freely among carriers. Given this, NYNEX believes that it would be appropriate for the Commission to make clear that when a carrier receives a request from another carrier for disclosure of CPNI, the carrier possessing the CPNI can rely upon the requesting carrier's statements that it possesses the requisite customer authorization.[23]

In taking this position, we note the following provisos. First, an affirmative request for disclosure of CPNI cannot be inferred from a customer's change of carrier. That is, a customer's change in carriers cannot be read as an implied consent for the previous carrier to release all of that customer's CPNI to the new carrier. In short, the competing carrier must obtain express approval that the customer requests its existing carrier to disclose its CPNI beyond what is necessary for the new carrier to provision its service. Second, the same rights and responsibilities must apply to all carriers and thus, for example, IXCs should not be in a position of requiring LECs to provide individual customer authorization forms to obtain a customer's CPNI from the IXC. Third, the carrier providing the CPNI should be permitted to recover the costs of disclosure from the requesting carrier.

Some commentors also raise concerns relative to an ILEC's responsibilities under Section 222(b) with regard to proprietary information that an ILEC

[23] The Commission should also consider developing customer authorization procedures similar to those established for verifying orders for long distance service generated by telemarketing. See, e.g., 47 CFR 64.1100

obtains or receives from another carrier in the context of its services.[24] NYNEX shares these concerns. The focus of these commentors on ILECs is, however, severely skewed. The issues they raise deal with the responsibilities and rights of all carriers. At some point, all carriers will be provided with proprietary information from other carriers that could potentially be used in an anti-competitive manner.

Some commentors have suggested that certain detailed requirements be imposed on ILECs including certification of compliance, pass key requirements and restrictions on access to data by marketing personnel. NYNEX believes these requirements are unnecessary and that their adoption would carry into the future the sort of requirements the 1996 Act was intended to eliminate. If the FCC decides to impose such requirements, they should apply equally to all carriers. Again, there is no basis for distinctions in the treatment of carriers under Section 222.

## VII. SUBSCRIBER LIST ISSUES

MCI and the Association of Directory Publishers ("ADP") suggest that the Commission adopt detailed regulations to address subscriber list issues. In addition to being unnecessary, the regulations suggested by these parties are unreasonable and contrary to Congressional intent. As shown in the NYNEX Comments and those of other parties, it is not necessary for the Commission to adopt regulations regarding the responsibilities of exchange carriers under Section 222(e).[25] It would be extremely

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[24] See, e.g., Telecommunications Resellers Assn. at 8.

[25] NYNEX at 21; USTA at 6; Pac Tel at 18; SBC at 15; Yellow Pages Publishers Assn. at 2; Information Technology Assn. at 10.

difficult to formulate regulations that would implement the broadly stated standards of Section 222(e) in any meaningful way. As noted by the Yellow Pages Publishers Association, Congress intended "to allow carriers flexibility in complying with the requirements of the statute."[26] Congress contemplated that these matters would be addressed in negotiations on a case-by-case basis

ADP suggests that Section 222(e) was intended to require a fixed uniform, national pricing policy.[27] Both MCI and ADP argue that the one true measure of "reasonable" charges under Section 222(e) is incremental costs.[28] The claims of these parties are supported neither by Section 222(e) nor its legislative history. All that the statute requires is that charges for subscriber list information be reasonable. A century of regulation has shown that there are any number of ways of determining what "reasonable" charges are. In the absence of the clearest possible Congressional mandate to do so, it is inherently unreasonable to assume that Congress intended to require the adoption of a single, fixed costing and pricing methodology.

With regard to the provision of "primary advertising classification," ADP claims that certain companies have evaded their alleged responsibility under state tariffs to provide a free Yellow Pages listing by having employees of their directory publishing

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[26] Yellow Page Publishers Assn. at 2 (footnote omitted).

[27] ADP at 13.

[28] MCI at 22-23; ADP at 19.

affiliates record primary advertising classification information.[29] This claim is unsupported. In any event, Section 222(e) imposes requirements on exchange carriers with regard to subscriber list information that they collect. If the exchange carrier does obtain the primary advertising classification, it is required by Section 222(e) to provide it upon receipt of a valid request. Section 222(e) was obviously not intended to create a requirement that carriers obtain and disclose information they do not possess.

MCI seeks to use Commission regulations as a means to require exchange carriers to disclose information that does not fall within Section 222(f)(3).[30] The type of information MCI seeks -- e.g., directory sections, community names -- is not subscriber list information under the statute.

Finally, MCI and ADP urge that the Commission specify a particular period as the measure of what "timely" means under Section 222(e).[31] The fact that each of these parties views a different period as what Congress intended by "timely" establishes what should be obvious -- whether or not the provision of data by a carrier is "timely" can be determined only on a case-by-case basis.

## VIII. CONCLUSION

It is essential that any regulations the Commission adopts to implement Section 222 recognize that Congress has itself established the appropriate balance of

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[29] ADP at 18.

[30] MCI at 22.

[31] MCI at 22; ADP at 22.

competitive and customer privacy concerns. The Commission must, as intended by Congress, provide carriers with flexibility in satisfying their responsibilities under Section 222.

Respectfully submitted,

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Dated: June 26, 1996

## CERTIFICATE OF SERVICE

I, Mike Rosa, hereby certify that copies of the foregoing **NYNEX REPLY COMMENTS** were served on the parties listed on the attached service list, this 26th day of June, 1996, by first class United States mail, postage prepaid.

Mike Rosa

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